absolutely preventing political parties from becoming involved in the election, at least forecloses the judicial candidate himself from overtly injecting such a partisan aspect into the campaign. From the perspective of *Amici*, these measures play an important role in preventing, or at least greatly curbing, the threat of a race to bottom, wherein judicial candidates must be willing to "drag the sack" and actively cultivate partisan alliances in order to have any chance of getting elected.

I. MINNESOTA'S REGULATION OF SOLICITATIONS BY JUDICIAL CANDIDATES PROVIDES SUBSTANTIAL RELIEF FROM A SERIOUS PROBLEM

A. Personal Solicitation by Judicial Candidates Creates a Number of Serious Problems

Based on their own experience, *Amici* submit that direct and personal solicitations of campaign contributions by a judge or judicial candidate are likely to be coercive, contribute to a widespread—and reasonable—perception of bias in the administration of justice, and deter many well-qualified attorneys and judges from seeking or remaining in judicial positions.

1. Personal Requests for Money by Judgeship Candidates are Coercive when Directed to Repeat Litigants

Direct appeals by the candidate himself frame the request for money in the most personal terms, and a refusal to contribute is thus likely to be construed as a rebuff. Even with a bar on disclosing contributors' identities to the candidate, a contributor has no way to be certain that his actions will not get back to the candidate in one way or another. Indeed, unless the contributor is peculiarly familiar with campaign regulations, he will not even know that his contribution decision is not supposed to make its way back to the judge. In all events, a personal request for financial assistance by a judicial candidate naturally gives rise to a

concern that the decision whether and how much to contribute may impact how one will be treated as a litigant.

To be sure, many—hopefully most—judges would never be influenced by the fact or absence of a contribution, assuming they learned of it. However, the possibility of such improper influence, based on one's response to a request for help, is an imponderable which generally cannot be evaluated with certainty. *See Republican Party v. White*, 416 F.3d 738, 774 (8th Cir.) (Gibson, J., dissenting) (noting that "a poll from Texas showed that 48% of state appellate and trial judges surveyed believed that campaign contributions had a fairly significant or very significant degree of influence over judicial decisionmaking"), *petition for cert. filed*, 74 U.S.L.W. 3303 (No. 05-566, Oct. 31, 2005). That uncertainty, coupled with the personal character of the appeal, puts repeat litigants especially in a very difficult position in determining how to respond.

2. Personal Solicitation by Candidates Compounds Public Perceptions of Judicial Bias

The practice of judicial candidates openly requesting and receiving large amounts of money—even if only through mass mailings and large meetings, and under a rule like Minnesota's that prohibits candidates from learning who did and did not give—contributes to a public perception, supported by empirical evidence, that judges may favor lawyers and litigants who contributed to their campaigns.

For example, a poll regarding Texas judicial elections, which include no bar on personal solicitation, revealed that fully 83 percent of Texans and 79 percent of practicing lawyers surveyed believed that campaign contributions significantly influence an elected judge's decisions. *White*, 416 F.3d at 774 (Gibson, J., dissenting) (citing Alexander Wohl, *Justice for Rent*, THE AMERICAN PROSPECT (May 22, 2000)). This perception is not always unreasonable, even if it cannot be determined whether it is accurate. The Texas

Supreme Court, for instance, was 750 percent more likely to grant petitions for discretionary review filed in 1994-98 by contributors of at least $100,000 than by non-contributors. Contributors of $250,000 or more were 1,000 percent more likely to be heard than non-contributors.[5]

3. Personal Solicitation by Candidates Creates Concerns Even Where a Party is not Solicited

For *Amici* and others, the effects of such potential bias are perhaps most acute in jurisdictions in which they are engaged in litigation, though they have little or no continuous presence there. In these locales, *Amici* sometimes find themselves exposed to the added risk of being seen as an out-of-state deep pocket. A former elected Justice of the West Virginia Supreme Court, Richard Neely, pointed out this problem by describing the view taken by some elected state court judges toward out-of-state defendants:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.[6]

The systemic damage associated with such "home-towning" is made worse when judicial candidates may

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[5] Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court*, http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm; *see also* Aman McLeod, *If At First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 505-09 (2005) (compiling and discussing studies demonstrating the effect of campaign contributions on judicial decision-making).

[6] Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From The Politics Of State Courts*, at 4 (The Free Press: New York 1988).

personally solicit campaign contributions. *Amici* will be at a real or apparent disadvantage against local adversaries who personally answered a judge's personal request for funds. *Amici* are thus forced to make judgments about whether to settle or try a case in such jurisdictions, often resulting in fewer cases being tried and higher settlements.

4. Allowing Personal Solicitation in Judicial Elections Deters Many Qualified Candidates from Seeking Judicial Office

Some of the *Amici* and their employees have participated, through bar associations, community organizations, and word of mouth, in efforts to encourage well-qualified attorneys to seek judicial office. Those efforts have revealed another serious downside of the increasingly expensive and contentious character of judicial elections: outstanding attorneys who might otherwise be interested in public service as a state court judge despite lagging salaries are often discouraged from seeking office in a system that effectively requires them to act in a way that undermines the appearance of judicial independence. *See, e.g.*, Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L.J. 107, 114 (2003) ("Not only is the amount needed to run a campaign often staggering, but many might find the notion of soliciting potential litigants and their attorneys for contributions to be ethically distasteful.").

The incentive to seek judicial office often rests on an altruistic desire to serve and to advance the public good through evenhanded application of the law. These idealistic aspirations are too often quelled, and candidacies are discouraged, by the necessity for candidates to engage in conduct such as the personal solicitation of funds.

B. Minnesota's Solicitation Clause Promotes the Integrity, Impartiality, and Quality of a State Judiciary

Although no reform can remove all concern that judicial elections will leave candidates beholden to their contributors

and deter some qualified candidates, Minnesota's solicitation clause addresses these concerns by reasonably regulating the method of judicial fundraising. Specifically, the clause leaves candidates fully free to raise funds through committees in a manner that largely eliminates the appearance that the candidate will later be influenced by contribution decisions. By preventing direct solicitation by candidates, this rule also avoids the most egregiously coercive aspects of judicial campaign solicitation.

Faced with a request from a campaign committee rather than the would-be judge, a potential donor has somewhat less reason to wonder whether declining to give will create a risk of unfavorable future treatment at the hands of the judge. This is especially true for litigants who may not be aware that their contribution decisions will be shielded from the candidate. This sensible limitation on the most problematic form of fundraising, while not a complete solution to the problem, also plays an important role in reassuring the general public that judges themselves are a step removed from the "nitty-gritty" of the fundraising process and, consequently, encourages qualified candidates to seek office. Further, the solicitation clause reduces concerns that *Amici* and other out-of-town litigants will be "home-towned" in jurisdictions in which they do not participate in judicial fundraising, because judges in these jurisdictions are less likely to be indebted to local interests when they do not know the identity of their contributors.

II. MINNESOTA'S MODEST LIMITATIONS ON PARTISAN ACTIVITIES BY JUDICIAL CANDIDATES REDUCES PERCEIVED BIAS AND PROMOTES THE SEPARATION OF POWERS

A. Entanglement Between Judicial Candidates and Political Parties During the Judicial Campaign Threatens Judicial Independence

Based on their own experience, *Amici* submit that judicial candidates' direct involvement with and dependence upon

political parties during the judicial campaign itself threatens the actual and perceived fairness of the state judiciary, undermines important separation of powers interests, and deters qualified judicial office-seekers.

1. Judicial Dependence upon Political Parties Raises Questions of Bias and Fairness of Judicial Proceedings

In *Amici*'s shared experience, the involvement of judicial candidates with political parties during contested campaigns has tended greatly to increase the financial and organizational resources needed to run a campaign. Intensely partisan campaigns are also the ones that most commonly feature a heavy emphasis on particular "wedge" moral issues, which likewise tend to polarize the electorate.

Such a situation tends to create an appearance, and may in turn create a reality, in which the candidate is beholden to his party endorser and is necessarily reliant on the party when the judge seeks re-election. This reliance, in turn, creates at least an appearance of potential favoritism wherever political interests are implicated in the judicial arena. Certainly this is true where the judge is called upon to adjudicate cases in which his political party is itself a litigant or, more often, in cases in which the judge is called upon to consider the validity of legislation sponsored by his party.

Further, direct partisan political involvement in judicial campaigns has been shown to be associated with disparately large awards against out-of-state parties and has contributed to a corresponding perception of judicial bias. A recent statistical analysis of tort cases found that tort awards for cases *adjudicated in state court* against out-of-state defendants were approximately 54% higher in states with partisan elected judges at all levels of the judiciary.[7] Furthermore, the "home-towning" effect in state court is

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[7] Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 367 (2002).

much stronger in these states: while tort awards against out-of-state defendants are larger than in-state defendants in all states, the disparity between awards against out-of-state and in-state defendants is much larger in partisan states than in non-partisan ones. These disparities cannot be explained by differences in substantive law, because the disparities between partisan and non-partisan states do not show up in federal diversity cases.[8]

Not surprisingly, senior in-house lawyers in large corporations, including *Amici*, widely believe that their employers are likely to face less than fair judicial proceedings in state courts that elect their judges in partisan elections. The U.S. Chamber of Commerce's Institute for Judicial Reform ("IJR") asked such lawyers to grade the "fairness" of the judges in each state and found that five of the six states with the lowest scores—Texas, Louisiana, Alabama, Illinois, and West Virginia—were among the handful of states that conduct partisan elections at all levels of the judiciary.[9] Similarly, the American Tort Reform Association's annual survey of "judicial hellholes"—defined as "places where judges systematically apply laws and court procedures in an unfair and unbalanced manner"—consistently identifies the majority of these so-called "hellholes" as courts within partisan election states.[10]

These surveys reflect a near total loss of confidence in some of our state court systems. Approximately 50% of the IJR survey respondents gave Louisiana and Alabama grades

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[8] *Id.* at 366.

[9] 2005 U.S. Chamber of Commerce State Liability Ranking Study, Final Report, conducted by Harris Interactive, *available at* http://www.instituteforlegalreform.com/harris/pdf/HarrisPoll2005-FullReport.pdf ("2005 U.S. Chamber of Commerce Study").

[10] *See* American Tort Reform Association, *Judicial Hellholes 2005*, *available at* http://www.atra.org/reports/hellholes/report.pdf. In 2005, 5 of the 6 jurisdictions designated as "hellholes" were located in partisan states; in 2004, 7 of 9 hellholes were so located.

of "D" or "F" on the issue of judicial fairness.[11] Alabama's state court system has been described as a "disgrace," a "quagmire," and a "place where you can be sued out of business"—in part because of harsh punitive damage awards that have been shown to be "unparalleled in the history of American jurisprudence."[12]

2. Judicial Candidates' Direct Involvement with and Dependence upon Political Parties Threatens Important Separation of Powers Interests

As the Framers of the federal Constitution recognized, the independence of the judge sitting on the bench is critical to the impartial administration of justice. *E.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton). While Minnesota and other states have chosen to elect their judges, they should be no less entitled to seek a judiciary independent of the political forces that elect their other branches of government. A system that requires a judge to become actively involved with and dependant upon a political party undermines the separation of powers that is essential to preserving judicial independence. While a state's legislative branch will be assembled by political party interests to pass laws, judges must be permitted to adjudicate the validity of those laws without being beholden to the same political forces that enacted them.

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[11] 2005 U.S. Chamber of Commerce Study, *supra*, n.8.

[12] *See* Nathan C. Prater, *Punitive Damages in Alabama: A Proposal For Reform*, 26 CUMB. L. REV. 1005, 1015-16 (1995) (quoting descriptions of the Alabama court system by, respectively, the *Mobile Register*, the *Wall Street Journal*, former Alabama Governor Fob James, and Yale Law School Professor George Priest).

3. Well-Qualified, Independent-Minded Judicial Candidates are Deterred by the Practical Requirement of Dependence on Political Parties

The partisan politicization of judicial elections means that candidate selection becomes dependent on intra-party politics and that election results become more dependent on fund-raising and campaign marketing controlled by the political parties.[13] These realities will have a substantial impact on the willingness of independent-minded candidates to seek office and on their chances of electoral success when they do decide to run. These consequences will still obtain without party labels on the ballot, where the candidates and their supporters nonetheless frame the election in highly partisan terms. Such *de facto* partisan elections also carry greatly increased fundraising demands and an unavoidable dependence on party resources.

B. Minnesota's Partisan Activities Clause Significantly Ameliorates Concerns that Judicial Candidates' Direct Involvement with and Dependence upon Political Parties Will Undermine the Impartiality, Independence, and Quality of a State Judiciary

Minnesota's partisan activities regulations combat these problems by reducing the extent to which its judges will become reliant on the political parties' endorsements, contributions, and rallies as a condition of elevation to the bench. They are effective in these respects, even though the limitations they impose are quite modest.

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[13] Charles Lewis, The Center for Public Integrity, *Judiciary Should Let Sunshine In To Reduce Public Skepticism, available at* http://www.publicintegrity.org/report.aspx?aid=301 (quoting media consultant Helen Lavalle as saying "We sell a judge the same way we sell anything. It's unfair. People are ending up with a chance to be on a bench who have no business being there.").

The partisan activities clause reduces judges' dependence on party leaders and organizations by prohibiting candidates from identifying with one party or the other. Candidates may not stake their public appeal on partisan affiliation, and fundraising efforts are thus much less likely to follow strictly partisan lines. Accordingly, candidates are far less likely to become sharply identified in the public mind with one party or the other, and the concerns about bias that flow from such identity are greatly reduced. Moreover, the potential influence of elected officials in other branches of government is likewise reduced for the same reason.

A truly non-partisan electoral process of the sort that Minnesota has sought to achieve is also far more inviting to well-qualified candidates who aspire to serve in an independent judiciary. By merely nudging the process away from party labels, the electoral debate is more likely to be centered on the abilities of the individual candidates, who will not effectively be required to pledge their loyalty to a political party as a pre-condition of appearing on the ballot.

III. THE FIRST AMENDMENT SHOULD NOT BE READ TO BAR REASONABLE REGULATION OF JUDICIAL CONTESTS

As detailed above, Minnesota and the many other states selecting judges by contested election have powerful, constitutional interests in preserving the integrity and independence of their judicial branches. Even assuming that Minnesota's efforts to regulate judicial solicitation and partisan activities are properly viewed through the lens of First Amendment strict scrutiny—a proposition that is far from clear[14]—the Eighth Circuit majority erred in holding

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[14] This Court has refused to apply strict scrutiny to regulations of campaign contributions (as opposed to expenditures) or to modest regulation of political association. *Clingman v. Beaver*, 125 S. Ct. 2029, 2039 (2005) ("When a state electoral provision places no heavy burden on associational rights, a state's important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions." (citation

that those regulations failed that test. Rather, as the Eighth Circuit dissenters correctly noted, Minnesota's effort to balance a host of competing constitutional concerns by imposing only relatively modest restrictions on speech and association is not a valid basis for condemning its efforts.

A. Minnesota Clearly Has a Compelling Interest in Judicial Integrity and Independence

It is clear, notwithstanding the holding below, that a state's interest in preserving the actual and perceived integrity of its judiciary "lies at the very heart of a state's ability to provide an effective government for the people." *White*, 416 F.3d at 766 (Gibson, J., dissenting).[15] Indeed, this Court has repeatedly recognized this interest as both legitimate and compelling. *E.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (referring to "preventing corruption or the appearance of corruption" as a "legitimate and compelling government interest[]"). This interest in avoiding actual and perceived bias and corruption of the judiciary is clearly implicated by both clauses at issue here.

First, the state undoubtedly has a compelling interest in addressing the risk or appearance of improper influence based on direct solicitation of contributions by a judge from individual litigants or their attorneys—whether the solicited

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(continued...)

omitted)); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-89 (2000) (refusing to apply strict scrutiny to regulation of campaign contributions). Here, Minnesota's effort to regulate direct solicitation of contributions leaves candidates fully free to request money so long as they do so in such a way as to minimize influence on subsequent judicial decision-making. As such, the regulation is unrelated to the suppression of any message or point of view. *See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Gresham v. Peterson*, 225 F.3d 899, 905 (7th Cir. 2000) (reviewing restriction on private solicitation of money).

[15] Of course, states are obligated to protect against the appearance of, as well as actual, judicial bias. *Cox v. Louisiana*, 379 U.S. 559, 565 (1965).

parties elect to give or not. *Nixon*, 528 U.S. at 390. And candidates for judicial office who know that "powerful and wide-reaching political organizations" have the ability to "make or break them in each election," incur moral "indebtedness" that is inconsistent with the discharge of the judicial function and "threatens the republic" assured to citizens of all states. *White*, 416 F.3d at 768-69, 773 (Gibson, J, dissenting); U.S. CONST. ART. IV, § 4.[16]

This Court's precedents clearly support the notion that states should be free to act against bias "in intermediate forms that are more subtle than bribery and explicit agreements." *White*, 416 F.3d at 769 (Gibson, J., dissenting). For example, this Court's decision in *Nixon* plainly recognized "a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." 528 U.S. at 905.

This Court has likewise upheld the Hatch Act's restrictions on the rights of federal employees to take roles in political campaigns, accept positions in political parties, or run for office on a partisan ticket, even though the Act does not require any actual corruption or influence to trigger its proscriptions. *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973). Clearly, the postal workers affected by the Hatch Act wielded far less partisan power and posed a lesser threat to "the great end of government—the impartial execution of the laws"—than state court judges. *Id.* at 564-65; *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (stressing the heightened due process interest in an impartial tribunal as "preserv[ing] both the appearance and reality of fairness.");

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[16] The "indebtedness" described by the Eighth Circuit dissenters runs invariably to and in favor of local interests. As a result, states like Minnesota have a compelling interest, arising under the Constitution's due process and interstate privileges and immunities clauses, in providing a fair forum to non-resident defendants. U.S. CONST. ART. IV, § 2, cl. 1.

Gannett Co. v. DePasquale, 443 U.S. 368, 392 (1979) (finding interest in a fair trial sufficient to outweigh assumed First Amendment right of press to attend pre-trial hearing).

B. The Eighth Circuit Misapplied This Court's Strict Scrutiny Analysis by Requiring Perfect, Rather than Simply Narrow, Tailoring

The Eighth Circuit majority rejected both clauses, reasoning that Minnesota had not tailored its efforts to fully eradicate the problems that it was purporting to address. But Minnesota's effort to balance competing constitutional obligations is worthy of considerably more judicial deference and respect than the Eighth Circuit afforded. *Compare White,* 416 F.3d at 756 ("the clause's underinclusiveness causes us to doubt that the interest it purportedly serves is sufficiently compelling to abridge core *First Amendment* rights" (emphasis added)), *with Nixon,* 528 U.S. at 400 (Ginsburg, J., concurring) ("[W]here constitutionally protected interests lie on both side of the legal equation . . . there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'").

The Eighth Circuit's approach would require such a delicate traipse between under- and over-inclusiveness that states could not conceivably craft any constitutionally adequate safeguard against the problem of actual or perceived judicial bias.

1. Minnesota's Regulation of Partisan Activities is Narrowly Tailored

The fact that Minnesota crafted its regulations on partisan activities to address only the most serious threats to the interest in judicial integrity and to minimize the constraints on First Amendment interests is hardly a basis to conclude that the regulations are fatally under-inclusive. Instead, this supposed under-inclusiveness confirms only that Minnesota has narrowly tailored its regulations to account for the competing constitutional interests at stake. As Judge Gibson

summarized in dissent, "[e]ven in questions subject to strict scrutiny, there simply has to be some room for judgment about how wide to cast the net, and it should be apparent that it is more offensive to the First Amendment for a measure to be too broad than to be too narrow." *White*, 416 F.3d at 783 (Gibson, J., dissenting).

To be sure, an under-inclusive effort to regulate First Amendment activities in connection with the assertion of new or novel interests can serve to demonstrate a pre-textual motive or to show that the interest at issue is insufficient, if the under-inclusion is unexplained. *Id.* at 775.[17] However, the interests advanced here are hardly new or unrecognized. *Republican Party v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (a state's interest in judicial integrity is well recognized and "of the highest order"); *see also Buckley v. Valeo*, 424 U.S. 1 (1976) (recognizing anti-corruption interest in connection with campaign finance regulations). Contrary to the holding below, Minnesota's efforts cannot be viewed as pre-textual merely because Minnesota has not taken the dramatic and exceedingly restrictive steps of barring candidates with any pre-established public political associations or barring all affiliations with interest groups. *Compare White*, 416 F.3d at 758, *with id.* at 768 (Gibson, J., dissenting). Rather, Minnesota may justifiably choose simply to prevent the indebtedness of judges to the campaign machines of political parties, which select candidates and have influence and power that vastly exceeds those of any interest group. *McConnell v. FEC*, 540 U.S. 93, 188 (2003) (rejecting

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[17] Narrow tailoring that leaves some aspect of the threat unaddressed does not compel the conclusion that the regulation is unconstitutional so long as there is some explanation for the state's targeting. *E.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding restrictions on television advertising despite failure to control other media); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (upholding restrictions on corporate contributions although union contributions remained unchecked).

under-inclusiveness challenge to campaign finance restrictions on political parties but not interest groups).

2. Minnesota's Prohibition of Personal Solicitation of Campaign Contributions is also Narrowly Tailored

Minnesota's effort to regulate solicitation was also reasonably drawn. While the Eighth Circuit majority condemned the regulation as forbidding candidates from personally signing a mass mailing or from appealing directly to large audiences for campaign contributions, it justified this conclusion only by reference to the same regulation's prohibition on the communication of the identities of contributors to the candidate. The majority thus turned the regulation on itself, by relying on one provision of the canon to render others unconstitutional. It also ignored the harmful effects of the types of personal solicitation that it found to be constitutionally protected.

Any direct appeal by a judicial candidate—especially when addressed to repeat litigants—is inherently highly coercive. This is still true of mass mailings and direct requests to large audiences. In each case, the recipient is unlikely to know (and in all events unlikely to trust) that his decision whether to contribute will be kept secret from the judge. Further, the supposed advantage of a mass mailing—that it involves no direct personal contact—is surely more than counterbalanced by the fact that it appears on its face to be an indiscriminate personal appeal for money addressed to many potential litigants and lawyers likely to appear in a judge's court. Such requests thus do a great deal of damage to the appearance of judicial integrity and impartiality.

States choosing among competing constitutional interests are compelled to draw lines somewhere. Where—as in the case of Minnesota's effort to regulate partisan activities and direct solicitation of funds from prospective litigants and their counsel—the line is drawn to minimize the impact on

the First Amendment and to address a harm that is especially acute, there is no basis for condemning the regulation.

IV. THE COURT SHOULD GRANT REVIEW NOW BECAUSE THE JUDICIAL ELECTIONS OF 2006 ARE LIKELY TO BE THE MOST CONTENTIOUS IN MODERN MEMORY

For a variety of reasons, Americans are now more focused on issues surrounding the judiciary than they have been in many decades. Since mid-2005, a public debate on the selection of United States Supreme Court justices, focusing on their positions on highly divisive issues, has been front-page material almost daily. This intense national interest comes at a time when, as set forth above, state judicial elections are becoming ever more contentious, expensive, and partisan.

These facts and others lead *Amici* to believe that the 2006 state judicial elections will be the most intense, hard-fought, and heavily funded in recent history, even as they will include 30 states who will hold elections for their Supreme Courts. And the issues presented in this case bear directly on the electoral processes of many states. Nine of the 19 states that have non-partisan judicial election systems have rules similar to the partisan activity limitation at issue here and will likely confront litigation concerning these regulations' validity in the midst of their primaries or general elections. And 29 of the 39 states with elected judiciaries have restrictions on personal solicitation similar to Minnesota's.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to grant the petition for *certiorari*.

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MARTHA HOLTON DIMICK, CHAIRPERSON, MINNESOTA BOARD ON JUDICIAL STANDARDS, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE* [1]

The Conference of Chief Justices is an association of the presiding officers of the highest courts of each State, as well as the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands. The Conference's mission is to improve the administration of justice in the courts of the States, commonwealths, and territories. In keeping with that mission, the Conference acts as the national voice of the state courts. The Conference has submitted *amicus* briefs in other cases of importance to state courts, including this case when it was previously before this Court.

This case concerns an issue of particular importance to the Conference: the States' ability to preserve judicial independence in States that elect their judges. For many years, the Conference has studied judicial selection procedures and recommended measures for improving them. In December 2000, the Conference helped to organize a conference of the chief justices of the seventeen most populous States that use judicial elections. This conference recommended that judicial elections be conducted in a nonpartisan manner. *See Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1355 (2001).

The decision below causes the Conference grave concern because it injects uncertainty into upcoming judicial elections, threatens the ability of some States to conduct meaningful nonpartisan judicial elections at all, and impairs the ability of other States to ensure that judges are and appear unbiased by campaign donations. The Conference urges this Court to

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. In accordance with Rule 37.6, *Amicus* states that this brief was not written in whole or in part by counsel for any party, and no person other than *Amicus* has made a monetary contribution to the preparation and submission of this brief.

review the decision below in order to clarify the scope of First Amendment limits on judicial election activity, to dispel the widespread confusion among the State governments and the lower courts over this issue, and to avoid the disruption that the decision below will cause judicial elections, most pressingly those scheduled to take place in 2006.

SUMMARY OF ARGUMENT

Judicial elections are a long-standing feature of the nation's state judicial systems. The practice of electing state judges began in the mid-nineteenth century, and it is now by far the predominant method of state judicial selection. As in judicial appointment systems, States that have adopted judicial elections have compelling interests in adopting procedures that help preserve judicial independence. Judicial independence is vital to the rule of law, the separation of powers, and the fair and impartial administration of justice. States should be free to advance these interests as a matter of their own self-government, even if they do not choose the judicial appointment process the Framers chose for the federal government.

The decision below, however, injects considerable uncertainty into the States' ability to serve these vital interests, and illustrates the confusion that this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), has engendered in the lower courts. Unless this Court clarifies the scope of First Amendment limits on state judicial election procedures, candidates for election or reelection to the bench, as well as state officials charged with regulating their conduct during judicial elections, cannot be sure whether partisan activity restrictions or personal solicitation restrictions are constitutional. Dispelling such uncertainty and confusion is particularly urgent because nearly all the thirty-nine States that use judicial elections are scheduled to hold elections this year.

States with judicial elections use various means to ensure judicial independence from politics. Nineteen States select at least some of their judges through nonpartisan elections, and